ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
Of the Telecommunications Act of 1996	)	

COMMENTS OF U S WEST, INC.

William R. Richardson, Jr.
David M. Sohn
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Robert B. McKenna
Jeffry Brueggeman
U S WEST, INC.
1801 California Street
Denver, CO 80202
(303) 672-2799

Dan L. Poole (of counsel)

Counsel for U S WEST, Inc.

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SUMMARY

The principal issue in this proceeding is whether there is any legal basis for limiting the extent to which requesting carriers may obtain UNEs as a substitute for special access and, if so, whether the Commission should in fact impose some such limitation. The answer to both questions is simple: The 1996 Act provides a clear and indeed compelling basis for the Commission to refuse to permit such substitution, and serious policy considerations argue for such a limitation as well.

First, the use of UNEs as a substitute for special access does not satisfy the "impairment" standard of section 251(d)(2). Because that standard asks whether lack of access to an element would impair a carrier's ability to provide "the services that it seeks to offer," the Commission's analysis plainly must be tailored to the specific services the requesting carrier seeks to provide. Carriers use special access circuits to provide business-oriented access and long distance services. Where a carrier already provides such services without using UNEs at all -- as IXCs and CAPs seeking to "convert" existing special access circuits to UNEs plainly do -- the lack of UNE-priced special access plainly would not "materially impair" the carrier's ability to continue to provide those services. Moreover, as a general matter, the market for special access services is sufficiently competitive that adequate alternatives to UNE-priced special access are readily available.

Therefore, under a proper application of the impairment test of section 251(d)(2), carriers should not have the right to convert existing special access services to UNE pricing by requesting a mere billing change. In addition, carriers should not be entitled to obtain UNEs where the predominant use would be for special access. For purposes of this limitation, the Commission should presume that a facility is used predominantly for special access if the facility

runs to a POP where the majority of the facility's capacity is either (i) terminated at a switch used mainly to route toll traffic, or (ii) multiplexed onto an unswitched, point-to-point circuit. The Commission should presume that a facility is *not* used predominantly for special access if it terminates the majority of its capacity in a local exchange switch.

Second, the Commission's authority under section 251(c)(3) to prescribe "just and reasonable" conditions on the use of UNEs provides an independent legal basis for limiting requesting carriers' ability to convert special access services into UNEs. There are strong policy reasons for the Commission to exercise that authority. Specifically, permitting the unrestricted conversion of special access to UNEs would have serious universal service consequences and, by forcing CAPs to compete with TELRIC rates, would undermine the substantial facilities-based competitive access industry that has developed thus far. Finally, permitting such substitution would expose the United States Treasury to significant potential takings liability.

The Commission also should exercise its section 251(c)(3) authority to continue its policy of requiring that a carrier seeking to obtain unbundled switching to provide switched access service must be willing to provide local service to the customer as well. The Commission adopted this policy because it recognized that, since each loop is associated with a particular switch port, as a practical matter the carrier controlling the switch port must provide all of the services that are to be carried over that local loop -- local exchange services as well as switched access. There is no basis for the Commission to modify its prior conclusion on this subject.

Finally, if the Commission nevertheless were to decide to permit the widespread substitution of UNEs for special and/or switched access, it should at a minimum adopt several regulatory reforms necessary to minimize the resulting distortions to competition and the regulatory regime.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its comments in response to the Commission's Fourth Further Notice of Proposed Rulemaking ("Fourth FNPRM") in this docket, as subsequently modified by the Commission's Supplemental Order.[1] The Fourth FNPRM asks whether there is any legal basis for limiting the extent to which requesting carriers may obtain UNEs as a substitute for special access services and, if so, whether the Commission should in fact impose some such limitation. It also asks commenters to refresh the record concerning whether a requesting carrier should be entitled to substitute UNEs for switched access for customers to whom the carrier does not provide local exchange service.[2]

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order" and "Fourth FNPRM"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order, CC Docket 96-98, FCC 99-370 (rel. Nov. 24, 1999) ("Supplemental Order").

[2] Fourth FNPRM ¶ 496.

As set forth more fully below, section 251(d)(2) of the Act provides compelling legal authority for limiting the use of UNEs to provide special access. Specifically, a faithful application of the "impairment" test set forth in that section dictates that a requesting carrier is not entitled to convert existing special access to UNE pricing by requesting a mere billing change, and likewise is not entitled to obtain UNEs where the predominant use would be for special access. In both cases the requesting carrier should simply purchase the ILEC's special access product, a regulated (albeit highly competitive) product offered under rules designed by the Commission to ensure that the terms and prices are just and reasonable. Allowing IXCs or CLECs to convert their special access circuits to UNE pricing would violate the Act. In addition, section 251(c)(3), by expressly authorizing the Commission to impose just and reasonable conditions on the availability of UNEs, creates an independent basis for the Commission to prescribe such limitations in order to promote the facilities-based competition goals of the Act and to avoid causing a significant revenue impact that would undermine universal service and distort competition. For similar reasons, and because of practical considerations related to the dedicated nature of switch ports, the Commission should retain its requirement that a requesting carrier may provide switched access with UNEs only where the carrier provides the end user with local exchange service as well.

I. THERE IS AMPLE AND INDEED COMPELLING LEGAL BASIS UNDER SECTION 251(d)(2) FOR LIMITING THE AVAILABILITY OF UNEs AS A SUBSTITUTE FOR SPECIAL ACCESS SERVICE.

A. The Impairment Standard of Section 251(d)(2), as Interpreted by the Supreme Court, Requires the Commission To Consider Whether UNEs Should Be Available for Some Purposes But Not Others.

Section 251(d)(2) of the 1996 Act requires the Commission to "consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of

the telecommunications carrier seeking access *to provide the services that it seeks to offer.*"[3] In the UNE Remand Order, the Commission explained that it would find impairment when, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to [an] element materially diminishes a requesting carrier's ability *to provide the services it seeks to offer.*"[4]

Thus, the plain terms of both the statute and the Commission's announced standard make clear that, if the impairment test of section 251(d)(2) is to be given substance (as the Supreme Court held that it must[5]), the Commission's analysis must be tailored to the specific services that a requesting carrier seeks to provide. There simply is no meaningful way to assess the impact on the ability of a requesting carrier "to provide the services that it seeks to offer" without analyzing (i) what the particular services are that the carrier seeks to offer, and (ii) what the potential impediments are to providing *those services*.

Because the impairment test must focus on the specific services that the carrier is seeking to offer, a finding that lack of access to a UNE would impair a carrier's ability to provide one type of service cannot be used to justify access to UNEs for the purpose of providing an entirely different type of service; the UNE's use for this second service would depend on whether that service too can meet the impairment test. In other words, under section 251(d)(2), a UNE's availability necessarily must be limited to those types of services for which the UNE satisfies the impairment test. At the very least, a UNE's availability should be contingent on its being used

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[3] 47 U.S.C. § 251(d)(2) (emphasis added).

[4] UNE Remand Order ¶ 51.

[5] *See AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 736 (1999).

predominantly for a service or services for which it satisfies the impairment test. A UNE that satisfies the impairment test when used to provide one type of telecommunications service need not be unbundled where the requesting carrier seeks to use it only in minor part to provide that service, and principally to provide a second type of service as to which the impairment test is not met.

The Commission has not yet conducted an impairment analysis targeted at special access services. The Commission's finding in the UNE Remand Order that transport UNEs satisfy the impairment standard was focused largely on the provision of local exchange service to the mass market.[6] The Commission never considered whether lack of access to these elements would impair a carrier's ability specifically to provide the business-oriented access and long distance services that use *special access* -- that is, the direct, unswitched transmission of nonlocal traffic between an end user and a carrier's point of point of presence ("POP").

B. Under a Proper Application of the Impairment Test, Carriers That Currently "Provide the Services They Seek to Offer" Successfully Without UNEs Should Have No Right To Convert Inputs of Those Services into UNEs.

U S WEST has received a number of requests from interexchange carriers ("IXCs") to "convert" existing special access circuits to combinations of unbundled loop and transport facilities at UNE prices. These IXCs already are successfully providing interstate services in a robustly competitive market without using any UNEs from U S WEST. Thus, it is clear that lack of access to UNEs does not materially impair requesting carriers' ability to provide the specific

[6] *See* UNE Remand Order ¶ 355 (discussing impairment with respect to "a competitive LEC's ability to offer services to a broad base of consumers"); *see also id.* ¶ 332 (finding of impairment supported by difficulty of using alternative sources to engage in "broad-based entry" and provide a wide scope of service offerings).

interexchange services that the IXCs are offering.[7] Similarly, U S WEST anticipates that it may soon receive conversion requests from competitive access providers ("CAPs") that currently purchase some special access circuits from U S WEST. Again, to the extent that such CAPs successfully provide service today without using UNEs at all, there is clear empirical evidence that their ability to provide such service is not be impaired by a lack of access to UNEs.[8]

Indeed, the sole purpose of requesting such conversions is to reduce the price of an input into the services that the IXC or CAP already provides. Some IXCs have candidly acknowledged that the switch from special access services to UNE combinations would be nothing more than a billing change: They hope to receive the exact same special access functionality in the exact same manner, just at a lower price. But the Supreme Court's decision in *Iowa Utilities Board* confirms that a mere price difference is not by itself sufficient to justify a finding of impairment.[9] Moreover, for a price difference to constitute impairment under the

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[7] *See* UNE Remand Order ¶ 306 (observing that "the presence of multiple requesting carriers providing service with their own packet switches is probative of whether they are impaired without access to unbundled packet switching," and accordingly finding no impairment with respect to packet switches serving business customers).

[8] The Commission in the UNE Remand Order decided to give little weight to the availability of tariffed ILEC services as an alternative to UNEs. *See* UNE Remand Order ¶ 67. U S WEST believes that that decision is inconsistent with the requirements of section 251(d)(2) as interpreted by the Supreme Court in *Iowa Utilities Board*, and U S WEST's comments in this proceeding are without prejudice to that position. But whatever the merits of the Commission's decision, it does not permit the Commission to blind itself to the existence of actual, well established marketplace competition. In other words, the point here is not that tariffed services could in theory provide a carrier with an alternative to UNEs, but rather that actual marketplace evidence in the provision of interchange and special access services demonstrates the viability of competing in those services without relying on UNEs. As noted above, the focus of the Commission's decision concerning tariffed alternatives was on the use of UNEs for local service, and would not necessarily apply to their use for interexchange service or special access.

[9] *See* 119 S. Ct. at 735 (rejecting "assumption that any increase in cost . . . imposed by denial of a network element . . . causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services").

standard adopted in the UNE Remand Order, there must be a showing that the difference "materially diminishes" the ability of requesting carriers to provide the relevant service.[10] Where requesting carriers already successfully provide the service without using UNEs -- as, for example, AT&T, MCI WorldCom, and innumerable other IXCs do with respect to interexchange service -- that showing plainly cannot be made.

In the same vein, it is not sufficient for purposes of showing material impairment to demonstrate that, without access to UNEs, a carrier may not be able to obtain special access circuits at a TELRIC price.[11] The Act does not create an absolute entitlement to pay TELRIC prices for all inputs.[12] Rather, the Act requires a serious analysis of whether a requesting carrier would have the ability successfully to "provide the services that it seeks to offer" using alternative, non-TELRIC sources of inputs. The carriers now seeking to re-price their purchases of special access services at TELRIC prices plainly have that ability, based on their obvious success in providing their existing services without relying on UNEs.

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[10] *See* UNE Remand Order ¶ 51. Put another way, the price difference must be sufficiently "substantive" to impair a requesting carrier's ability to provide service. *Id.*

[11] A footnote in the UNE Remand Order arguably appears to assume the opposite -- namely, that an inability to obtain special access at TELRIC may be sufficient to find impairment. *See* UNE Remand Order ¶ 341 n.673 (supporting finding of impairment on ground that, "even in those areas where competition for special access is present and where, presumably the triggers for pricing flexibility have been met, the price differentials between TELRIC-priced transport and special access may persist for an indefinite period time"). As discussed in the text above and in the following footnote, that position is untenable.

[12] It would be impossible to reconcile such an entitlement with the Supreme Court's holding that not every price difference constitutes impairment for purposes of section 251(d)(2). If the availability of all inputs at TELRIC were considered fundamental to a carrier's ability to compete, then by definition any divergence of price from TELRIC would constitute impairment.

Accordingly, under a proper application of the impairment test, carriers should not have the right to convert existing special access circuits into combinations of loop and transport UNEs.[13] Those UNEs simply do not and cannot satisfy the impairment test for that purpose.

C. Under a Proper Application of the Impairment Test, a Carrier Should Have No Right To Obtain Combinations of Unbundled Loops and Transport Where Its Principal Purpose Is To Provide Special Access Service.

As a more general matter, even for carriers not merely requesting a change in the billing of existing purchases of special access circuits, the use of combinations of loop and transport UNEs to carry nonlocal traffic directly to a carrier's POP does not satisfy the impairment test. Therefore, a carrier should not be entitled to such UNE combinations when the carrier intends to use them predominantly as a substitute for ILEC special access.

1. The Special Access Market Is Sufficiently Competitive That Lack of UNEs Does Not Materially Impair a Carrier's Ability To Provide Services That Use Special Access as an Input.

As set forth in greater detail in the Special Access Fact Report submitted by USTA, the special access market has been open to competition before 1984. Today competitive access providers are numerous, widespread, and well established: Over 100 carriers provide competitive access services,[14] and their share of the special access market is growing rapidly. Annual special access revenues earned by CAPs have risen from $500 million in 1995 to $2.5 billion in 1998 to an estimated $5.7 billion in 1999 -- nearly 52 percent of the estimated combined special access revenues of the BOCs and GTE.[15] The CAPs' 1999 market share of the

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[13] This limitation should apply not just to conversions of *current* special access circuits, but to conversions of *future* special access circuits as well. That is, on a going forward basis, a carrier that purchases and successfully provides services using special access service as an input should not have the right subsequently to decide to convert the service to a UNE.

[14] Special Access Fact Report at 5, Appendix A.

[15] *Id.* at 6.

total special access market was approximately 33 percent, comparable to the combined long distance market share of MCI WorldCom and Sprint.[16] Moreover, many CAPs are owned by or controlled by large IXCs or CLECs, and thus have a secure customer base and ample access to capital.[17]

The advanced state of competition in the special access market is not surprising in light of the nature of special access customers. The purchasers of special access are "IXCs and large businesses, not residential or small business end users."[18] As the Commission has previously observed, "business customers are highly demand-elastic," meaning that they are sophisticated buyers who can and do seek out and request proposals from multiple vendors.[19] Moreover, large business customers generate substantial quantities of traffic, making them attractive targets for competitive suppliers. In the UNE Remand Order, the Commission recognized the development of competition to serve business customers and accordingly held that business customers in certain areas are not entitled to obtain unbundled switching.[20]

Consistent with this analysis, U S WEST previously has documented in extensive detail the high degree of competition for high capacity services -- a category that includes virtually all

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[16] *Id.*

[17] *Id.* at 2, 5. In particular, TCG, which pioneered the CAP business back in 1984, was acquired by AT&T in 1998. MFS, another early CAP, was acquired by WorldCom (now MCI WorldCom) in 1996.

[18] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14297 ¶ 142 (1999) ("Pricing Flexibility Order").

[19] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271, 3306 ¶ 65 (1995).

[20] *See* UNE Remand Order ¶ 291 ("[C]ompetition has continued to develop, primarily for business customers or users with substantial telecommunications needs."); *id.* ¶ 294 (distinguishing "between the mass market -- where competition is nascent -- and the medium and large business market -- where competition is beginning to broaden").

special access services -- in the Seattle and Phoenix metropolitan areas. In both areas, competitive carriers have deployed extensive fiber networks that offer ample alternatives to the ILEC for special access connections.[21] Competitors' share of the special access market in each city has been increasing rapidly, and they have been particularly successful in capturing an ever larger share of the new demand.[22] Simply put, competitors have had substantial success in deploying their own facilities to serve the large business customers who are the end users of special access circuits.

Indeed, the Commission itself recognized in its recent Pricing Flexibility Order that "the variety of access services available on a competitive basis has increased significantly."[23] The Commission accordingly granted several types of regulatory relief on an immediate basis and provided for additional relief where certain collocation-related triggers are satisfied. The Commission further acknowledged that, even though it was basing certain deaveraging triggers on collocation, "collocation is a conservative measure of competition in that it does not measure competition from competitors that bypass LEC facilities altogether."[24] And in the UNE Remand Order, the Commission acknowledged that the market for entrance facilities is particularly

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[21] *See* Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Seattle, Washington MSA, CC Docket No. 99-1 (Dec. 30, 1998) ("Seattle Forbearance Petition") at 14-16, 26-31; Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket 98-157 (Aug. 24, 1998) ("Phoenix Forbearance Petition") at 14-16, 26-31.

[22] *See* Seattle Forbearance Petition at 21; Phoenix Forbearance Petition at 21.

[23] Pricing Flexibility Order at 14233 ¶ 19.

[24] *Id.* at 14280 ¶ 104. Some CAPs compete by collocating in ILEC central offices, as they are entitled to do under 47 C.F.R. § 64.1401-02, and constructing fiber entrance facilities from those offices to IXC POPs. But in other cases, CAPs bypass the ILEC network entirely, laying fiber directly from IXC POPs to end user customers.

"mature" and may "provide requesting carriers with effective alternatives to unbundled transport for certain point-to-point routes."[25]

Likewise, state regulators in many states in U S WEST's region have taken substantial steps towards deregulating U S WEST's special access services on the ground that the market for such services is now competitive. For example, the Oregon Public Utility Commission recently decided to deregulate special access services with a DS-3 capacity on the ground that "service and price competition exists for the service in question," and that "the number of competitors . . . indicates that there are no significant economic or regulatory barriers to entering this market."[26] The Washington Utilities and Transportation Commission recently ruled that "effective competition" exists for DS-1, DS-3, and SONET services in six metropolitan wire centers in Seattle and Spokane and reclassified U S WEST's services accordingly.[27]

The widespread existence of CAPs with their own fiber networks means that carriers generally have significant third-party alternatives to the ILEC's special access services. Moreover, the evident ability of these CAPs to deploy fiber to large business customers makes clear that, given the high volumes of traffic that such businesses support, it often will be economically feasible to self-provision special access to such customers. Under the Commission's new impairment test, and consistent with the Supreme Court's holding in *Iowa Utilities Board*, both third-party availability and the feasibility of self-provisioning weigh heavily

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[25] UNE Remand Order ¶ 348.

[26] *Petition of U S WEST Communications, Inc., to Exempt from Regulation U S WEST's DS3 Service,* Order No. 00-003 (Ore. PUC, Jan. 3, 2000) at 3.

[27] *Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits in Selected Geographical Locations,* Eighth Supplemental Order Granting Amended Petition for Competitive Classification, Docket No. UT-990022 (Wash. Util. and Transp. Comm'n, Dec. 21, 1999).

against a finding of impairment.[28] In short, the marketplace evidence strongly demonstrates that lack of special access at TELRIC rates does not materially impair a carrier's ability to provide services that use special access as an input.

The absence of impairment is particularly evident in the case of IXCs, who use special access as an input to their interexchange services. There simply is no plausible argument that lack of access to an incumbent LEC's UNEs would "materially diminish" an IXC's ability to provide interexchange service. The interexchange market has long been competitive, and numerous IXCs have been able to enter the market without relying on UNEs. The Common Carrier Bureau's Industry Analysis Division has reported that the number of long distance carriers more than tripled from 1986 to 1997,[29] and the Commission in 1998 found that "over 600 carriers provide long distance services" and that, "as a group, carriers other than the four largest long distance carriers have demonstrated annual growth rates exceeding 40 percent."[30] IXCs now seek UNEs in order to obtain a price break on one of their inputs, but the idea that failure to obtain that price break would materially impair their ability to offer interexchange service is absurd.

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[28] *See* UNE Remand Order ¶ 56 (in order to comply with Supreme Court decision, Commission in applying impairment test must "consider elements available from all sources, including those elements available from third-party suppliers and through self-provisioning"); *see also id.* ¶ 51 (impairment analysis takes into consideration "availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier").

[29] Common Carrier Bureau Industry Analysis Division, *Trends in Telephone Service* (Feb. 1999) at 10-1.

[30] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18050 ¶ 40 (1998).

2. Therefore, Requesting Carriers Should Not Be Entitled To Obtain Combinations of Loop and Transport Facilities for the Primary Purpose of Carrying Nonlocal Traffic Directly to a POP.

Since the use of UNEs to provide the equivalent of special access service does not satisfy the impairment test, carriers should not be permitted to demand UNEs for that purpose. This reasonable limitation on the availability of UNEs is consistent with the terms and purposes of section 251. Indeed, it is necessary to "give substance" to section 251(d)(2) and to create the type of carefully balanced unbundling regime that Congress intended, as opposed to a significantly overbroad regime approaching "blanket access."[31]

However, a further refinement to this limitation may be necessary to avoid its widespread evasion. The Commission already has found that requesting carriers are generally entitled to obtain loop and transport UNEs for the purpose of providing local services.[32] Enterprising carriers likely would try to rely on this right, and on the underlying finding of impairment with respect to their ability to provide *local exchange services*, to bootstrap unbundled access for *special access* purposes as well.

In particular, it probably would be possible in many instances to route some local exchange traffic over the same UNEs that would be used for special access. Therefore, a carrier whose purpose was to obtain UNE pricing for its special access traffic would arrange to carry a small amount of local traffic over the relevant UNEs and then demand unbundled access on that basis. Once the carrier has obtained the UNEs, it would use the bulk of the capacity for special

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[31] *See Iowa Utilities Board,* 119 S.Ct. 721, 735 ("[I]f Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the Commission has come up with, it would not have included § 251(d)(2) in the statute at all."); *see also id.* at 753 (Breyer, J., concurring) ("the statute's unbundling requirements, read in light of the Act's basic purposes, require balance").

[32] *See* UNE Remand Order ¶¶ 162-201, 318-379

access traffic. In effect, the carrier would be carrying the local exchange traffic to qualify for that service's impairment finding, while still using the UNEs predominantly for an entirely different service (special access) that otherwise would be subject to an entirely different (and more limiting) impairment analysis.

To prevent this type of evasion, the Commission should make clear that the limitation of the availability of UNEs for special access purposes extends to any UNE that is used *predominantly* for special access, and is not limited to UNEs that are used solely for that purpose. Specifically, the Commission should adopt a presumption that a facility is used predominantly for special access, and therefore need not be unbundled, if the facility runs to a POP where the majority of the facility's capacity is either (i) terminated at a switch used mainly to route toll traffic, or (ii) multiplexed onto an unswitched, point-to-point circuit. The Commission should likewise adopt a presumption that a facility is *not* used predominantly for special access if it terminates the majority of its capacity in a local exchange switch. (AT&T has itself acknowledged that switches that primarily route toll traffic are distinct from switches that primarily route local exchange traffic.[33]) This approach would permit requesting carriers to obtain elements genuinely intended to be used for local exchange competition, while at the same time preventing carriers from using a token amount of local exchange traffic as a cover for what is really an effort to obtain special access at UNE prices.

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[33] *See* Reply Comments of AT&T Corp. on Second Further Notice of Proposed Rulemaking, CC Docket 96-98 (June 10, 1999) at 104 ("AT&T's existing toll switches simply cannot be enlisted to support mass-market entry" into the local exchange services market); *id.* at 95 (AT&T's toll switches "cannot be used to provide certain basic aspects of local service -- such as emergency 911, information, and operator services -- that are essential to a comprehensive local service offer.").

II. THE "JUST AND REASONABLE CONDITIONS" LANGUAGE OF SECTION 251(c)(3) PROVIDES A STRONG AND INDEPENDENT LEGAL BASIS FOR THE COMMISSION TO LIMIT THE CONVERSION OF SPECIAL AND SWITCHED ACCESS INTO UNEs.

A. Section 251(c)(3) Permits the Commission To Fine Tune the Scope of Unbundling Obligations in Order To Ensure Just and Reasonable Results.

Section 251(c)(3) expressly recognizes that a carrier's unbundling obligations must be subject to "terms and conditions" that are "just, reasonable, and nondiscriminatory." And section 251(d) makes it clear that Congress intended the Commission to establish regulations to carry out the provisions of section 251.[34] Accordingly, the Commission may prescribe rules concerning the specific "just, reasonable, and nondiscriminatory" conditions that will apply to unbundled access.

Clearly, conditions that have the purpose and effect of ensuring that unbundled access does not undermine any of the goals and policies of the Act would qualify as "just and reasonable." Therefore, the Commission has sound legal authority to impose such conditions on a nondiscriminatory basis. In particular, the Commission has authority to condition the use of UNEs to provide access service on the requesting carrier's willingness to use those UNEs to provide local exchange service as well, if the Commission finds that failure to impose such a condition would threaten universal service, distort competition, or yield demonstrably impractical results.

Conditioning the availability of UNE combinations on a carrier's use of those UNEs to provide local exchange service would be fully consistent with the intended effect of section

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[34] *See* 47 U.S.C. § 251(d)(1) (setting a deadline for the Commission to "establish regulations to implement the requirements of this section"); *id.* § 251(d)(3) (reflecting Congress's expectation that the Commission will "prescrib[e] and enforce[e] regulations to implement the requirements of this section").

251(c)(3). Congress's fundamental purpose in enacting section 251 was to facilitate new entry and competition in the market for *local exchange services* -- a market which, unlike that for interexchange services, had seen very little competition prior to the 1996 Act and was widely assumed to need some type of legislative action to enable competition to develop.[35] Congress never contemplated that the section would be read as a license for IXCs to demand drastic and immediate price cuts for access services. To the contrary, Congress expressly provided in section 251(g) that the Act was not to disturb the existing regime governing access services, including the rules governing "receipt of compensation" by LECs.[36] Moreover, Congress in section 251(i) expressly preserved the Commission's jurisdiction to regulate prices for interstate services, while in section 252(c)(2) it gave state commissions jurisdiction over the pricing of UNEs.[37] Allowing unrestrained substitution of UNEs for interstate access services would effectively cede to the states an enormous portion of the federal pricing authority that Congress expressly sought to preserve in section 251(i).

In short, section 251 was intended to promote widespread local exchange competition, not widespread arbitrage of the existing federal access charge regime. Enabling

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[35] *See, e.g.,* S. Rep. No. 104-23 at 5 (1995) ("The legislation reforms the regulatory process to allow competition for *local telephone service*" (emphasis added)); William E. Kennard, *Fostering Competition in a Converging World*, Remarks Before the Practicing Law Institute / Federal Communications Bar Ass'n Policy and Regulations Conference, Dec. 9, 1999 (*available at* www.fcc.gov/commissioners/kennard/speeches.html) ("In 1996 Congress adopted a different approach -- a regulatory one -- to break up the *local phone monopoly*. Instead of forcing the locals to divest, Congress gave the FCC the power to pry open the network and make it available to competitors." (emphasis added)).

[36] Section 251(g) also provides that the Commission may adopt regulations "expressly supersed[ing]" the existing regime governing access services. However, leaving the existing rules in place while allowing them to be eviscerated by arbitrage hardly constitutes the type of *express* regulatory action contemplated by the statute.

[37] *See* 47 U.S.C. §§ 251(i), 252(c)(2).

large IXCs such as AT&T and MCI WorldCom to obtain a major price break on an input to their well established interexchange offerings just by sending a letter requesting a billing change, and without any functional changes in their operations or in their relationship with the LEC, bears no relation to the purposes of section 251. Nor are the section's purposes served by giving a comparable price break to well established CAPs whose ability to provide service without UNEs is evident from even a cursory survey of the marketplace.

B. Permitting the Unrestricted Conversion of Special Access To UNEs Would Have Serious Adverse Policy Consequences.

Permitting carriers to substitute UNEs for special access on an unrestricted basis would have a number of adverse policy consequences. First, it would have a substantial revenue impact on U S WEST, with serious implications for its ability to maintain its planned level of investment and hence to provide quality service on a ubiquitous basis. Because requesting carriers assert that the conversion of special access to UNEs involves nothing more than a billing change, allowing such conversions would likely lead to a widespread flash cut of special access services to UNE prices. The result is that U S WEST could see a substantial drop in revenues, without any corresponding change in its costs. Quantitative data on the estimated revenue impact on U S WEST and other ILECs have been submitted to the Commission under a protective order. As a qualitative matter, the consequence of such arbitrage on U S WEST investment is clear: A significant loss in revenues, while costs remain constant, inevitably will lead to significantly lower levels of investment. This is particularly true because special access is an important growth area and hence a key driver of new investment.

Moreover, special access charges remain an important component of the highly complex system of interstate and intrastate rates that, in the aggregate, is intended to balance the ILECs' right to cost recovery plus profit with consumers' interests in reasonable rates and, in particular,

affordable prices for basic telephone service. As the Commission has recognized, rates for individual services often do not reflect the services' costs; rather, the system is rife with implicit cross-subsidies.[38] Implicit support is inherent, for example, in the Commission's access charge rate structure, in the jurisdictional separations process, and in rate averaging rules.[39] The Commission has stated its intention to eliminate implicit subsidies, but the job is far from complete.[40]

Determining the precise amount of subsidy embedded in any particular rate is difficult, to say the least. Indeed, the Commission has focused considerable attention on identifying implicit subsidies, and has yet to complete the task.[41] What is clear, however, is that immediately

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[38] *See, e.g., Federal-State Joint Board on Universal Service,* Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078, 8081 ¶ 6 (1999) ("Seventh Universal Service Order").

[39] *See id.* at 8136-37 ¶¶ 124-25 ("Some of this [implicit] support resulted from the Commission's rate structure rules . . . The separations rules, which divide costs between the interstate and intrastate jurisdictions, may have caused additional support. . . . Another source of interstate implicit support stems from our requirement that incumbent LECs recover most of their access charges through averaged rates.").

[40] *See* Seventh Universal Service Order at 8099 ¶ 43 ("We agree with the Joint Board that the Commission has the jurisdiction and responsibility to identify support for universal service that is implicit in interstate access charges. Moreover, we agree with the Joint Board that it is part of our statutory mandate that any such support, to the extent possible, be made explicit."); *Federal-State Joint Board on Universal Service,* Ninth Report and Order and Eighteenth Order on Reconsideration, CC Docket 96-45, FCC 99-306 (rel. Nov. 2, 1999) ("Ninth Universal Service Order") ¶ 2 n.9 ("We intend to address the support that may be implicit in interstate access charges in a *future order*" (emphasis added)).

[41] *Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, 8785 ¶ 13 (1997) ("First Universal Service Order") (stating the Commission's intention to "over the next year identify implicit interstate universal service support"); *Access Charge Reform,* First Report and Order, 12 FCC Rcd 15982, 15986-87 ¶ 8 (1997) ("First Access Reform Order") ("through both our *Universal Service Order* and this *First Report and Order* on access reform, interstate implicit support for universal service will be identified and removed from interstate access charges"); Seventh Universal Service Order at 8082 ¶ 7 (stating that the Commission has "taken steps toward identifying support implicit in interstate access rates"); *id.* ¶ 43 (observing that "[I]n this proceeding and in our pending Access Charge Reform proceeding, we are

slashing one significant element of the current rate system to TELRIC levels, as permitting the conversion of special access to UNEs would do, would radically undermine the coherence of the system and the adequacy of the universal service support that it provides. Simply put, rates are too interdependent. Special access is one important leg on which the system stands, and it should not be removed before that system has been replaced with a new one.

Indeed, it is precisely this interdependence that drove the Commission to adopt a market-based approach to access reform, under which access rates would be reduced *gradually*, as competition develops. In its First Access Reform Order, the Commission observed that "Congress recognized that the conversion of the existing web of implicit subsidies to a system of explicit support would be a difficult task that probably could not be accomplished immediately," and that, "even if we were more confident of our ability to identify all of the existing implicit support mechanisms at this time, eliminating them all at once might have an inequitable impact on the incumbent local exchange carriers."[42] The Commission expressly rejected the suggestion that it prescribe new, TELRIC-based access rates, in part because of the "rate shock that would accompany such a great rate reduction at one time."[43] Allowing carriers suddenly to demand TELRIC prices for special access -- precisely what AT&T and others seek in asserting the right to convert special access to UNEs -- would be, as a practical matter, equivalent to the already-rejected prescriptive approach to access reform.

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endeavoring to identify the types of implicit support in interstate access charges and the amount of that support," and seeking comment on how to proceed "once we determine the amount of implicit support").

[42] First Access Reform Order at 15987 ¶ 9.

[43] First Access Reform Order at 16107 ¶ 290.

Moreover, permitting conversion of special access services to UNEs would result in the loss not just of universal service subsidies embedded in special access rates, but of a substantial portion of the subsidies embedded in switched access rates as well. As the Commission has observed, relatively low prices for special access naturally would cause business customers to migrate from switched access to special access.[44] As a result, LECs would lose critical business customer revenues that currently subsidize lower rates for residential service.[45]

In addition to the universal service impact, permitting conversion of special access to UNEs despite the absence of real impairment would distort competition in the access service market. One of the primary functions of the impairment test is to prevent the distortions in competition that would result from an overbroad unbundling regime. As Justice Breyer explained in his concurring opinion in *Iowa Utilities Board*, overbroad unbundling requirements actually undermine the development of meaningful competition.[46] The Commission has acknowledged the force of this concern in the UNE Remand Order.[47]

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[44] *See* First Access Reform Order at 16024, 16154 ¶¶ 103, 401-02 (discussing possible migration of business customers from the public switched network to special access as a result rate disparities).

[45] *See, e.g.*, First Universal Service Order at 8787 ¶ 17 (under current system, "urban business customers" pay local exchange and exchange access rates that subsidize service to other customers); First Access Reform Order at 16023 ¶ 101 (acknowledging that new access charge structure "will require customers with multiple telephone lines to contribute, for a limited period, to the recovery of common line costs that incumbent LECs incur to serve single-line customers").

[46] 119 S.Ct. at 753.

[47] *See* UNE Remand Order ¶ 7 ("[I]t is only through owning and operating their own facilities that competitors have control over the competitive and operational characteristics of their service, and have the incentive to invest and innovate in new technologies that will distinguish their services from those of the incumbent. Unbundling rules that encourage competitors to deploy their own facilities in the long run will provide incentives for both incumbents and competitors to invest and innovate, and will allow the Commission and the states to reduce regulation once effective facilities-based competition develops.").

Permitting the unrestricted conversion of special access to UNEs, despite the fact that many CAPs have been and continue to be able to provide special access without relying on ILEC facilities, would have just such a distorting effect. As discussed above, CAPs currently provide an estimated $5.7 billion dollars per year in competitive special access services, and the figure has been growing rapidly. In U S WEST's region, CAP's rates are generally about 15 percent lower than U S WEST's tariffed rates. However, TELRIC prices are generally about half of U S WEST's tariffed rates. Therefore, if CAPs are suddenly forced to compete with ubiquitously available TELRIC-priced UNEs -- which are nothing more than artificially cheap special access circuits -- the CAPs will be forced to slash their rates by about 40 percent. This would devastate the existing facilities-based CAP business, fatally undermine the business case for additional facilities investment, and have the perverse result of increasing dependence on ILEC facilities. Of course, because the instant availability of TELRIC-based special access would be a windfall for IXCs, most major CAPs are unlikely to object to the evisceration of the facilities-based side of their business: The large CAPs have already been acquired by large IXCs such as AT&T and MCI WorldCom, who are more than willing to give up the facilities-based access competition in exchange for ubiquitous TELRIC-based special access. But the Commission, unlike the IXCs, should not be willing to wipe out facilities-based competition as a viable strategy in the special access market.

Finally, any decision that permits the substitution of UNEs for existing special access services would expose the United States Treasury to significant potential liability. In its actions thus far in this docket, the Commission generally has taken the position that granting competitors

mandatory access to an ILEC's property does not constitute a physical taking of property.[48] That position appears to be inconsistent with the Eleventh Circuit's recent *Gulf Power* decision, which found section 224, a provision granting mandatory access to rights-of-way, to constitute a taking.[49] The Commission has also contended that its TELRIC pricing methodology for unbundled elements would constitute adequate just compensation in the event that a physical taking had indeed occurred.[50] However, the setting of just compensation for a physical taking of an ILEC's property is not, at its core, a ratemaking function that focuses on the ILEC's overall rate of return. Quite to the contrary, the ILEC is entitled to such just compensation no matter how profitable the ILEC may be in the conduct of its business with its remaining property.

If the CAP or IXC contribution towards "just compensation" were limited to TELRIC, it would be significantly lower than (generally about half of) the tariffed price. The amount of compensation that would be owed by the government for a physical taking could therefore include at least the difference between the tariffed price and the TELRIC price. Allowing the

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[48] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Fourth Report and Order, CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9, 1999) ¶ 226 ("As we have previously stated . . . dedicating a particular element to a new entrant's exclusive use does not effect a physical occupation of any incumbent LEC's property because the incumbent LEC retains physical dominion over the network elements.").

[49] *See Gulf Power v. United States,* 187 F.3d 1324, 1328 (11th Cir., 1999).

[50] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15872 ¶ 740 (1996) ("[W]e conclude that, even if the 1996 Act's physical collocation and unbundled network facility requirements constitute a taking, a forward-looking economic cost methodology satisfies the Constitution's just compensation standard.").

conversion of special access circuits to UNEs thereby threatens the government with a billion dollar debt to the ILECs.[51]

The government's potential takings exposure is already large in the area of such UNEs as unbundled loops, switching, and transport. But at least these matters are more closely related to the intent of Congress to jump start competition in the traditional monopoly local exchange market. In the case of converting special access circuits to UNEs, given the vibrant nature of the competition in the market for special access and for the interexchange services to which such special access is an input, it is much more doubtful that Congress intended for the Commission to find the impairment test satisfied at all, and far less that Congress intended for the Commission to spend the public's money in the enterprise. [52]

C. Permitting the Unrestricted Conversion of Switched Access to UNEs Is Not Feasible as a Practical Matter and Would Raise Many of the Same Policy Problems as Conversion of Special Access.

In addition to the question of special access bypass, the Commission in the Fourth FNPRM, the Commission asks parties to "refresh the record" on the issue of *switched* access bypass -- that is, the question of whether carriers should be permitted to use combinations of transport and switching UNEs "to originate and terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service."[53]

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[51] *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (purpose of the Takings Clause is "to bar government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole").

[52] *See Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1411 (D.C. Cir. 1994) (holding that an "agency action that creates a broad class of takings claims," *id.* at 1445, will be sustained by the courts only if that action is unambiguously mandated by statute).

[53] Fourth FNPRM ¶ 496.

The Commission addressed this very issue in 1996, and it correctly concluded that carriers are "effectively precluded" from using UNEs to provide switched access without the accompanying local exchange service.[54] The Commission held that "a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions and capabilities of the switch, including switching for exchange access and local exchange service, for the end user."[55] Therefore, "as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier.[56]

The Commission's 1996 analysis on this issue was entirely accurate. As a practical matter, it simply is not feasible to allow requesting carriers to use UNEs to provide switched access to customers to whom they do not also provide local exchange service. This is because, in contrast to special access, switched access necessarily involves the use of UNEs that have components that are dedicated to an individual customer. Specifically, the Commission has defined unbundled switching to include dedicated components such as the switch ports. The practical consequence of this is simple: Since each local loop is associated with a particular switch port, the carrier controlling that switch port must provide all of the services that are to be carried over that local loop -- local exchange service as well as switched access.

Moreover, because the Commission's definition of the switching element has always included the switch port, neither the Commission nor the ILECs have ever addressed the serious billing, tracking, and recording issues that would arise if the switching function associated with a

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[54] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Order on Reconsideration, 11 FCC Rcd 13042 (1996).

[55] *Id.* at 13048 ¶ 11.

[56] *Id.* at 13048-49 ¶ 12.

particular local loop were somehow divided between two or more carriers. Any party advocating this type of fundamental change should be required to explain in detail how it could be made to work from a practical perspective and how these significant billing, tracking and recording difficulties could be resolved.

In short, there is no basis for the Commission to modify its prior conclusion on this subject. Because of the dedicated nature of the switching element, it simply is not feasible to permit a requesting carrier to use unbundled switching to provide access service to customers to whom it does not also provide local exchange service.

In addition, the unrestricted conversion of switched access into UNEs would raise many of the same policy problems as conversion of special access. As detailed in the data that ILECs submitted to the Commission under the protective order, permitting unlimited bypass of switched access would have a significant revenue impact on U S WEST and other ILECs, which in turn would imperil ILEC investment and raise serious universal concerns. Unrestricted conversion of switched access to UNEs also would stunt the development of facilities-based access competition.

III. AT A MINIMUM, ANY DECISION TO PERMIT THE CONVERSION OF SPECIAL AND SWITCHED ACCESS TO UNES MUST BE ACCOMPANIED BY THE ADOPTION OF SEVERAL RELATED REGULATORY REFORMS.

As discussed above, the impairment standard of section 251(d)(2) and significant policy considerations argue strongly for a rule that restricts the ability of requesting carriers to demand a flash cut to UNE prices for all special and switched access. But if the Commission were nonetheless to decide to permit the widespread conversion of special and/or switched access services into UNEs, it should recognize that other regulatory reforms must be adopted simultaneously to minimize distortions to competition and the regulatory regime.

In particular, opening the door to unlimited special and/or switched access arbitrage would lead to a rapid and fundamental transformation of the access market, with arbitrage becoming a dominant force. In light of that transformation, incumbent LECs should be given the flexibility to respond competitively to the new arbitrage offerings. Indeed, failing to permit such flexibility would be an unnecessary and counterproductive restriction on competition and would be inconsistent with the procompetitive purposes of the 1996 Act. Of course, given the highly regulated nature of current ILEC access rates, granting the appropriate flexibility would require fundamental reforms. Specifically, simultaneous with the onset of the new arbitrage opportunity, ILECs should be freed from the complex and price-distorting web of price cap regulations that govern the structure of access rates. ILECs likewise should be permitted to deaverage those access rates. Without such reforms, ILECs' ability to respond competitively to the new arbitrage opportunities would be substantially hampered.

If the Commission were not inclined to substantially deregulate ILEC pricing of access services to permit appropriate competitive responses to arbitrage, it should at least refrain from permitting widespread conversion until it has eliminated all identified implicit cross-subsidies remaining in the rate structure. For example, the Commission should eliminate the disparity between primary residential and multiline business customers with respect to the SLC and PICC. As a result of that disparity, multiline business customers effectively subsidize the local rates of residential customers.[57] But if carriers were given the unrestricted ability to convert switched access into UNEs, they would quickly arbitrage away the subsidy by targeting those business customers for UNE-based competitive switched access. The Commission likewise should reconsider the assessment of local charges, rather than interstate access charges, on ISP traffic --

[57] *See* First Access Reform Order at 16023 ¶ 101.

a policy that effectively has caused access rates paid by non-ISPs to subsidize inexpensive ISP access. Again, the unrestricted conversion of access services to UNEs would eliminate the source of the subsidy. The Commission should adopt appropriate reforms to prevent these and similar unintended consequences that would otherwise result from unrestricted conversion.

Respectfully submitted,

William R. Richardson, Jr.
David M. Sohn
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Robert B. McKenna
Jeffry Brueggeman
U S WEST, INC.
1801 California Street
Denver, CO 80202
(303) 672-2799

Counsel for U S WEST, Inc.

Dan L. Poole
(of counsel)

January 19, 2000

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 19th day of January, 2000, I caused true and correct copies of the foregoing Comments of U S WEST, Inc. to be served by hand via messenger upon the following parties:

Chairman William E. Kennard
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B201
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B115
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A302
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 Twelfth Street, SW
Room 8-C302
Washington, DC 20554

International Transcription Service, Inc.
1231 20th Street, NW
Washington, DC 20036
(Served With Diskette)

Jodie Donovan-May
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-C313
Washington, DC 20554
(Served With Diskette)

Lawrence Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-C450
Washington, DC 20554

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-C327
Washington, DC 20554

Carol Mattey
Division Chief of Policy
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-B303
Washington, DC 20554

Bob Atkinson
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-C356
Washington, DC 20554

John Meehan